

GCD8BACC

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

ORRIN BACOTE,

Plaintiff,

v.

16 Cv. 1599 (GHW)

RIVERBAY CORPORATION, et al.,

Defendants.

-----x

December 13, 2016  
3:00 p.m.

Before:

HON. GREGORY H. WOODS

District Judge

APPEARANCES

COHEN & FITCH LLP

Attorneys for Plaintiff

BY: GERALD M. COHEN

ILYSSA S. FUCHS

ARMIENTI DeBELLIS GUGLIELMO & RHODEN, LLP

Attorneys for Defendants

BY: HORACE O. RHODEN

VANESSA M. CORCHIA

GCD8BACC

(Case called)

THE DEPUTY CLERK: Counsel, please state your appearances.

MR. COHEN: Gerald Cohen with Ilyssa Fuchs for Mr. Bacote, the plaintiff. Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. RHODEN: Good afternoon, your Honor. Horace Rhoden, for the defendants, with Vanessa Corchia from my office.

THE COURT: Thank you very much. Good afternoon.

So we are here for a conference with respect to a number of discovery related disputes that have been brought to my attention by a letter dated December 9. I would like to take up those issues in turn, beginning with the plaintiff's request that I compel the deposition of one of the defendants, Mr. Leath.

Let me hear from you first, Mr. Cohen. What is the request and what is the basis for the request?

MR. COHEN: Your Honor, just by way of background, as I detailed in the letter, Mr. Leath, when he was originally disclosed to plaintiffs, shortly before the last discovery deadline, formally with a supplemental disclosure, we moved to immediately amend the complaint to add Mr. Leath.

I asked defense counsel if he was representing Mr. Leath. He said, as he said with all the other defendants, I

GCD8BACC

1 don't know, I can't tell you, I'm not sure. He said,  
2 potentially Riverbay might, but he no longer works there,  
3 here's the last known address.

4 Per your Honor's order, I immediately filed an amended  
5 complaint, literally the day after your order was issued. We  
6 used a private investigator to track down Mr. Leath because I  
7 couldn't find him with the last known address. We couldn't  
8 find him with a regular process server. After some time we  
9 were able to finally serve Mr. Leath.

10 It turns out that Mr. Leath and my client apparently  
11 had worked together at the Department of Corrections many years  
12 ago, and Mr. Leath called my client and said, What's this  
13 about? And my client said, I remember seeing you at the  
14 precinct. I didn't know you were actually there during the  
15 incident. In any case, I didn't even know you were going to be  
16 named as a defendant. I am learning of it as you are.

17 So my client calls me and says, He wants to speak to  
18 you. I said, I can't speak to him if he is represented by  
19 counsel. He said, He is not represented by counsel, he wants  
20 to speak to you. So I said, Listen, you can give him my phone  
21 number, but I can't really speak to him until I confirm that he  
22 is not represented by counsel.

23 So Mr. Leath gives me a call. I tell him, Before we  
24 say anything --

25 THE COURT: Before you begin, in your description of

GCD8BACC

1 your client's call with Mr. Leath, you did not reference any  
2 comments made by your client to Mr. Leath about his dismissal  
3 from the case. There is a reference to such a comment being  
4 made to him in the joint letter. Can you please address that  
5 before you move on?

6 MR. COHEN: I never once --

7 THE COURT: Not you; rather, your client.

8 MR. COHEN: My client never once -- well, I wasn't  
9 privy to that conversation. As far as I understand, my client,  
10 when I spoke to him, said, Why did you name him? I told him he  
11 was the one that accompanied you to the van. And he said to  
12 me, Well, I was beat up in the van. I said, Well, do you think  
13 it was him? He said, I'm not sure it was him, my eyes were so  
14 full of Mace I don't know who it was. I said, I am telling you  
15 that the other officers mentioned that he accompanied you to  
16 the van. And that was my understanding.

17 I don't know what my client said to Mr. Leath, the God  
18 honest truth. I did not ever tell Mr. Leath that I was going  
19 to dismiss the case if he spoke to me.

20 THE COURT: I am sorry for taking you out of order.  
21 Please proceed.

22 MR. COHEN: Thank you.

23 Before I ever spoke to him about any incident, other  
24 than to tell him, look, I represent Mr. Bacote, I said, I have  
25 to write you an e-mail; I want to explain to you the risks of

GCD8BACC

1 speaking to me. I detailed the risks in writing. I said,  
2 Listen, you have to respond to me and say you fully understand  
3 and you wish to continue to speak to me. He said to me over  
4 the phone, when I told him that, I don't believe I did anything  
5 wrong; I am confident you're going to dismiss the case against  
6 me. He jumped to that conclusion on his own. So go ahead and  
7 send your e-mail and then we can talk. So I had a conversation  
8 with Mr. Leath shortly after he responded to my e-mail.

9 My issue here is at that time, when I spoke to Mr.  
10 Leath, he told me, I am starting a new job the 10th. He also  
11 told me he has no intention of being represented by Riverbay;  
12 he doesn't like the people at Riverbay, and he wanted to go  
13 forward without Riverbay, and he is so confident that we are  
14 going to drop the case because he was trying to help my client  
15 out. Those were his words to me.

16 So I say, OK, we need to get you on the record; we  
17 need to have a deposition. What dates are you free? He gave  
18 me a couple of dates, and I looked at my calendar. I took  
19 those dates. I immediately, the next day, served him with a  
20 notice of deposition, provided it to Mr. Rhoden, and asked Mr.  
21 Rhoden if that date was free.

22 As is per the case with dealing with Mr. Rhoden  
23 throughout this entire litigation, he did not respond to me for  
24 quite a while. I kept asking him if the 7th was available.  
25 Then I learned he had issued -- a week or two later he had

GCD8BACC

1 issued a bunch of depositions to nonparty witnesses for dates  
2 that he never consulted me about, which I was also upset about  
3 because I didn't learn about them until the witnesses started  
4 calling me and said, I got noticed for a deposition. There was  
5 no indication that he was going to serve them for those dates.  
6 He didn't consult me if I was available. It has been par for  
7 the course for this litigation. There is no consideration for  
8 my time.

9 THE COURT: I'm sorry. Were you served with copies of  
10 the notices of deposition?

11 MR. COHEN: After they were served.

12 THE COURT: Thank you.

13 MR. COHEN: After I wrote a long e-mail about how, in  
14 general practice in the federal rules, to serve notices of  
15 deposition. He pointed out that he wasn't asking for documents  
16 so they don't have to be served pursuant to Rule 45. I believe  
17 that's technically the rule, but I know, as a matter of  
18 courtesy, I know when I have issued deposition notices or  
19 subpoenas, I reach out to the other party and make sure that  
20 they are available, and that was not done. That consideration  
21 was not done, as has been really par for the course for this  
22 entire litigation with Mr. Rhoden.

23 Then thereafter he said one of the subpoenas he issued  
24 was for a nonparty witness named Natalie Jardine for the 7th.  
25 I got in touch with Ms. Jardine -- actually, I got in touch

GCD8BACC

1 with my client, who was in touch with Ms. Jardine, who said she  
2 is not going to be in town on the 7th. So I repeatedly  
3 e-mailed Mr. Rhoden and said, Listen, I know she is not  
4 available that date. Could we keep the 7th because you are  
5 available that date, I know you are because you issued a  
6 subpoena for that date, let's keep that date for Mr. Leath so  
7 we can get this discovery done. We are really getting close to  
8 the deadline.

9 Again, there was no response for quite a bit. Finally  
10 he said, if you could get me another date with Ms. Jardine, I  
11 will agree to change the date for Mr. Leath. I could not get  
12 in touch with Ms. Jardine. Apparently, he had finally served  
13 the subpoena on her and was able to get a new date. And we  
14 confirmed, I think around November 28, 29, the date for Mr.  
15 Leath. That communication is included in the exhibits that I  
16 submitted to the Court.

17 Mr. Rhoden then asked me if I had any notes -- first,  
18 we had a conversation with this Court, and he explained that I  
19 had spoken with Mr. Leath. He had said to your Honor that he  
20 wasn't representing him yet. He doesn't know if he is  
21 representing him. Mr. Leath hadn't done whatever he needed to  
22 do to get representation. That continued. It wasn't until  
23 December 5 that I actually got a notice by phone call from Mr.  
24 Rhoden that he was actually going to be representing him at the  
25 deposition already scheduled for the 7th.

GCD8BACC

1           He asked me on that conversation whether I had any  
2 written notes of my conversation, at least that's what I  
3 understood. I said I had no written notes of our conversation.  
4 Then he said, I am going to follow up in writing. I am going  
5 to confirm the date of the 7th and other deposition dates that  
6 we discussed. In that e-mail, he asked me if there were any  
7 statements, and I did have a recording of Mr. Leath, and I  
8 provided it on the next business day, I think -- that day, the  
9 5th, and the deposition was scheduled for the 7th.

10           There was one communication done the next day, I think  
11 on the 6th, around 4:00 in the afternoon. No indication that  
12 the 7th was not going. He asked me if there was any more of  
13 the recording. I said, that's all I captured in our  
14 conversation. There was apparently some missing parts of the  
15 recording, the initial part and the ending part. I am not used  
16 to dealing with recordings because I don't generally do them.  
17 I did consult with the ethical opinion that he cited in his  
18 paper before I did any recording, and I am fully aware of the  
19 rules and I believe the narrow exception under which you can  
20 record someone.

21           THE COURT: Just on this point, would you mind telling  
22 me what the basis was for your decision to record that  
23 conversation?

24           MR. COHEN: Yes. After advising this defendant that  
25 he was an adversary, that our interests are not aligned, I am



GCD8BACC

1 only representing plaintiff, I warned him completely of those  
2 facts. The decision from the bar that Mr. Rhoden had cited  
3 says in situations -- I am going to quote right from it. It  
4 says, In situations involving the investigation of ongoing  
5 criminal conduct or other significant misconduct that those  
6 questions will be often easy to answer in the affirmative. I  
7 am referring to whether you can record them without giving  
8 notice. And they said, Or when an attorney has reasonably -- a  
9 witness may be willing to commit perjury in either a civil or  
10 criminal matter.

11 This is a civil rights case, your Honor. This  
12 particular defendant is charged with either being involved in  
13 beating my client while he was in handcuffs or present while  
14 other officers were beating my client while he was in  
15 handcuffs. I think this is a very significant matter in terms  
16 of this case. I think it actually has criminal implications.  
17 There are officers who have been prosecuted for far less. I  
18 believe, because he was an adverse party, if he were to change  
19 his testimony, which I believe is highly likely now that he is  
20 being represented by Mr. Rhoden, I would have something to  
21 impeach him with.

22 So I know there is a narrow exception under which an  
23 attorney can record a conversation. I believe this squarely  
24 fits in that narrow exception, your Honor. I consulted with  
25 this particular opinion by the Bar Association where they

GCD8BACC

1 overturned the general ban on attorneys recording witnesses.  
2 This is not a common occurrence in my practice. I do not  
3 record my conversations. In fact, that is the reason why I was  
4 missing part of the recording, because I am not even sure -- I  
5 wasn't very familiar with the process when I was doing it, and  
6 I didn't know when the witness would be calling me. So that's  
7 why there is something missing at the beginning, and I think at  
8 the end there were some technical difficulties that I had.

9 The entirety of the recording that I captured I turned  
10 over to Mr. Rhoden, which, by the way, I don't believe I was  
11 required to, but because the discovery deadline was  
12 approaching, I didn't feel like it was proper to wait 30 days  
13 from the written request.

14 In any case, I did respond to Mr. Rhoden's request  
15 about whether this was the entirety of the recording. I said,  
16 this is all I have, these are all the statements that he has  
17 made, including the e-mail exchange that I had with Mr. Rhoden,  
18 I included that, including the notice of deposition that I sent  
19 to Mr. Rhoden. I said, I am just confirming we will see each  
20 other tomorrow morning at 11. No response. In fact, there was  
21 no response until about 11, 11:30 a.m. the next morning when I  
22 was waiting for Mr. Rhoden to come to my office for the  
23 deposition.

24 At that time -- and I didn't want to raise this in my  
25 portion of the papers because usually settlement negotiations

GCD8BACC

1 are confidential, but Mr. Rhoden raised it in his portion -- he  
2 called me and said, Do you want to settle the case? I told Mr.  
3 Rhoden, Now we have expended a significant amount of resources  
4 and time. This is a 1983 case. We have attorneys' fees that  
5 are attached at this point. And I made a much higher demand  
6 than I initially made before we had expended that many  
7 resources. Mr. Rhoden hung up and said, I'll call you back. I  
8 said, Well, are we going through this deposition or not? No  
9 response.

10 About a half an hour or so later, while the court  
11 reporter is still waiting there, I get a call and he says, We  
12 are not going to be able to resolve this case. I said before  
13 he hung up, Mr. Rhoden, why don't you come down here, we can  
14 talk about settlement and whatever while you're down here, and  
15 if we don't resolve this case, we can do the deposition. He  
16 said, No, I can't do it that way.

17 He hung up the phone, called me back another half an  
18 hour later saying, OK, I will agree to produce my client if you  
19 don't ask him about conversations you had with him that's not  
20 captured in the recording. I said, Well, let me know the rule  
21 that says that I can't do that. I don't know what rule that  
22 you're referring to. I am happy to look at whatever you have  
23 got to show me that I am not allowed to do that, and I will  
24 abide by that rule. He said, I am not going to produce the  
25 witness unless you agree to that.

GCD8BACC

1 I said, OK. I said, Are you telling me you're not  
2 coming? He said, Wait a minute, wait a minute. He said, I  
3 will call you back. Again, he wouldn't confirm one way or the  
4 other. I sent him several e-mails about, Listen, there is a  
5 reporter here, I have been waiting here, can you just tell me  
6 one way or the other if you're coming? There wasn't a response  
7 till about five minutes to 1:00 or so, where he finally writes  
8 out his position, and I take it as he is not coming. I told  
9 him that I don't presently intend to ask him any questions  
10 outside of what's in the recording, because there really wasn't  
11 much that was discussed outside of those recordings, but I  
12 don't see why I would be precluded from asking those questions.  
13 He didn't provide me any reasons as to why that would be a  
14 rule. He said, if I were going to ask him questions about  
15 stuff outside the recording, I would have to provide a synopsis  
16 of those conversations that I had with Mr. Leath.

17 That was really it. There was no indication in those  
18 conversations that he was going to move to disqualify me or  
19 that he was going to move to preclude the recordings or  
20 anything like that, which is really just a sideshow to distract  
21 the Court from the fact that he just, again, is delaying  
22 discovery and not moving forward. Had I just said, I agree not  
23 to use any statements made to me either on trial or in a  
24 deposition, then he would have produced the client. I didn't  
25 even understand if that's a rule. Again, I was asking him for

GCD8BACC

1 some guidance as to where he was coming from with that request,  
2 but I was not getting any.

3 THE COURT: Thank you.

4 So I understand the request at this point is that I  
5 compel the appearance of Mr. Leath for a deposition. When are  
6 you proposing that I order that the deposition take place?

7 MR. COHEN: Well, we have depositions scheduled on the  
8 15th and then on the 19th. In this case, I am leaving for  
9 vacation on the 19th. My associate is going to be handling the  
10 deposition on the 19th, which happens to be the last day of  
11 discovery in this case. Then I am not going to be back in town  
12 until the week between Christmas and New Year's. I potentially  
13 can do a deposition Friday. It's not going to be a very long  
14 deposition.

15 THE COURT: How many hours do you anticipate the  
16 deposition will last?

17 MR. COHEN: Would you mind if I just check real quick?

18 THE COURT: Please.

19 MR. COHEN: I can do it tomorrow from 10 to 2.

20 THE COURT: How many hours do you anticipate?

21 MR. COHEN: Not more than four hours, potentially  
22 less.

23 THE COURT: Is there anything else you would like to  
24 tell me with respect to your application?

25 MR. COHEN: No, your Honor. I just want to express

GCD8BACC

1 my -- and I don't know if I have already done so --

2 THE COURT: I think you have.

3 MR. COHEN: -- my frustration with this process.

4 THE COURT: Understood. I don't think I need to hear  
5 more on that particular topic, understanding that the topic you  
6 wish to raise is your frustration with Mr. Rhoden's conduct  
7 during discovery as a whole. I don't think we need to spend  
8 more time on that rather than to focus on the particular issues  
9 before the Court.

10 Mr. Rhoden, would you like to be heard on this issue?

11 MR. RHODEN: Yes, your Honor. Thank you. Good  
12 afternoon.

13 Your Honor, the last time we had a conference was on  
14 November 18, 2016. At that time, your Honor, I brought up the  
15 understanding that I heard, which he told me verbally, that he  
16 had a conversation with Mr. Leath. I brought that up to your  
17 Honor in our conference, which was recorded.

18 Mr. Cohen spoke to this Court and told him what he did  
19 and what he said to Mr. Leath. The recitation that he just  
20 gave here today, as to what he did and what he spoke to Mr.  
21 Leath about, is totally different from what he told your Honor  
22 back on November 18 on that record, and I have a copy of the  
23 record that was done on that date with me today. His  
24 recitation that he gave today is totally different from what he  
25 said to the Court.

GCD8BACC

1           On that day, he did not indicate to the Court that  
2           this conversation that he had was recorded, at no time. Once  
3           the conversation was over, I spoke with Mr. Cohen, and I asked  
4           him specifically whether or not he had recorded the statement.  
5           And he told me, No, he did not.

6           On December 2nd, we came up with a schedule, a  
7           discovery schedule. I reached out to him. I reached out to  
8           all the nonparty witnesses. I got the nonparty witnesses  
9           scheduled, I got his scheduled, and after we talked we came up  
10          with a schedule for the remaining discovery. And I e-mailed  
11          him the schedule for the remaining discovery that we had  
12          between my clients and his clients.

13          Also, when I sent that e-mail, I realized he told me  
14          verbally that there was no recording. Let me put it in writing  
15          here. Let me get an answer from him in writing that there is  
16          no recording. And so on December 5, I asked him again, Do you  
17          have any statements from Mr. Leath? For the first time he then  
18          produced this recording, a recording, by his own admission, he  
19          had since November 17. Before the conversation with this Court  
20          on November 18, he had had that recording. By the federal  
21          rules he was required, it is electronic -- it's documents  
22          stored electronically. Federal Rule 26 says those things must  
23          be disclosed, even without me asking for it.

24          Secondly, in my initial demands, initial discovery  
25          demands back in May, I believe, I asked for any statements that

GCD8BACC

1 he had. So if he had had these things, one, he was obliged to  
2 turn it over without me asking; and, two, back in May, I asked  
3 him in my initial discovery demands, and I have copies of my  
4 initial discovery demands with me, and at no time after  
5 receiving this conversation had he informed me prior to  
6 December 5.

7 So for the first time on December 5 he sent me the  
8 recording, and I was somewhat surprised. So I sent him an  
9 e-mail -- I sent him two e-mails since he sent me that  
10 recording, and I said to him, you know, you told me that you  
11 did not have any recordings of my client, but here you are now  
12 sending me a recording. And when I sent him that e-mail, he  
13 responded to that e-mail, and he never denied that he had told  
14 me this. And I sent it in two separate e-mails, and I believe  
15 I attached a copy of those e-mails to the Court. He responded  
16 to the e-mails and never denied that he told me that. Both  
17 times he responded and both times he never denied that he told  
18 me he did not have any recordings. The first time that he said  
19 he never said this was when he did this letter saying he never  
20 made any such statement to me, but he had a full opportunity to  
21 say that, which he did not.

22 Your Honor, once I received this recording, to my  
23 surprise, it was 20 minutes long and portions of the  
24 conversation was missing; the beginning of the conversation was  
25 missing, the ending of the conversation was missing. I reached



GCD8BACC

1 out to my client. My client came into the office on December 7  
2 at 9:30 a.m. with the full intention that he would go to the  
3 deposition, that was the date that the deposition was  
4 scheduled. And my client informed me he had three  
5 conversations with Mr. Cohen.

6 And, also, during our November 18 conversation, when  
7 we brought up the statement, what was indicated to us was that  
8 my client had told him that he was proceeding pro se. I asked  
9 him, Did you tell him you were appearing pro se? He says, No,  
10 I never told him that. I don't even know what pro se means. I  
11 informed him I would talk to him because he told me, both him  
12 and his client, Mr. Bacote, told me that they would let me out  
13 of the case. And in his e-mail to my client, which was turned  
14 over, there is an indication here. My client -- I would like  
15 to read a portion of the e-mail.

16 THE COURT: Thank you. I have seen the sentence  
17 you're referring to.

18 MR. RHODEN: Where Mr. Cohen indicated that he would  
19 potentially let him out. And then my client responded and  
20 said, I understand that you're going to let me out of the case.

21 THE COURT: Thank you. Let me just correct the record  
22 on that.

23 The November 17, 2016 e-mail from Mr. Leath says, "In  
24 addition, as I see no need for representation at this time, as  
25 I expect to be removed from this action."

GCD8BACC

1 MR. RHODEN: Yes, your Honor.

2 In Mr. Cohen's letter to Mr. Leath, "I represent Orrin  
3 Bacote, the plaintiff in this matter, and you are now (at least  
4 for the time being) one of the defendants." Again, an  
5 indication that he was going to let him out. That's an  
6 indication that they did have this conversation. And that was  
7 the understanding with Mr. Leath, that he was going to let him  
8 out, and here again that's why, when Mr. Leath responded, he  
9 put that in there. So that was his full understanding.

10 During our November 18 conversation, one of my  
11 concerns was that Mr. Leath, in speaking to him, doesn't  
12 realize that he is entitled to representation and at no cost to  
13 him. Mr. Cohen indicated that he explained all this to Mr.  
14 Leath. Mr. Leath says no. Mr. Leath -- and you have a copy of  
15 his affidavit -- says, yes, I could get my attorney, but at no  
16 time did he indicate to me that, one, I can get it from  
17 Riverbay, that it would be of no cost to me. I believe that I  
18 had to get my own attorney at my own expense, and with him  
19 saying that he was letting me out, that is why I decided to go  
20 ahead and have the conversation. Secondly, he never informed  
21 him at any time that this conversation would be recorded. It  
22 was done without his consent, without his knowledge.

23 So seeing this on the morning of the 7th, talking to  
24 Mr. Leath with the recording, I just could not go ahead and  
25 send him to a deposition where he could be clearly ambushed by

GCD8BACC

1 questions that I am not aware of, about conversations that I  
2 have no information about.

3 So my concern, after discussing with my office, the  
4 parties in my office, What do we do here? My first thought  
5 was, let's see if we can resolve this case.

6 Now, in his letter to the Court, he claims that I  
7 didn't do anything until 11:30, when I first called him and  
8 started talking about the taping, which is not the case. I  
9 called him well before that, and we had about 30 minutes back  
10 and forth regarding settlement. That was my first thing, can  
11 we resolve this case, let's see if we can do that. And he  
12 apparently went and called his client to call me back, I called  
13 my client to call him back, and there was a conversation going  
14 back and forth for about 30 minutes. But after more than  
15 doubling his settlement demand it was decided, no, we could  
16 not.

17 The second thing is, what can I still do to go forward  
18 with this deposition, because I understand the Court's desire  
19 that these depositions go forward, and I wanted to follow the  
20 Court's rules, I did not want to not follow the Court's rules.  
21 So what I said to him is, if you can give me -- because I know  
22 there was another conversation that's not on this tape, and if  
23 you could give me the sum and substance of those conversations,  
24 let me know what those conversations are, or, if you don't want  
25 to do that, if you can tell me that you won't be asking him any

GCD8BACC

1 questions regarding any statements that was not turned over to  
2 me, I will bring him for the deposition. I am just located  
3 four blocks from his office, approximately four blocks from his  
4 office. We will come down and bring him to the deposition.

5 Over the phone he told me he would not be asking any  
6 questions that's not part of the recording that he turned over  
7 to me. However, when I asked him to put it in writing, he  
8 refused to do that. That's when he told me, if something comes  
9 up, I don't know of anything, but if anything comes up, I  
10 reserve the right. That's what he told me on paper. But  
11 initially he told he would not be asking any questions. Had he  
12 done that, I would have brought him in for the deposition. He  
13 was in my office. He was prepared. What I couldn't do, and I  
14 think it would be -- as an attorney, I wouldn't be doing my  
15 client justice to know that there is a conversation that he had  
16 with my client that I had known nothing about. Now he can go  
17 and ask my client, well, didn't you tell me this, with  
18 information that I know nothing about. I could not bring him  
19 into that.

20 The next thing --

21 THE COURT: Can I ask you about that, Mr. Rhoden. At  
22 an earlier stage in this case, you took issue with the  
23 plaintiff's request for videotapes of the body camera, saying  
24 that you thought it was, in essence, inappropriate for them to  
25 have the recording in advance of the depositions, with the

GCD8BACC

1 concern that they would be able to modify the testimony to be  
2 consistent with what was shown in the video recordings. Why  
3 isn't this the inverse of that issue?

4 MR. RHODEN: Your Honor, regardless of what the issue  
5 was, you ruled on that and we accepted your ruling. You told  
6 me to turn over the recording, and we did that. We turned it  
7 over within the time. So regardless of what my feeling was, my  
8 personal opinion was, I think it's the same. I am not sure  
9 exactly what your Honor is asking.

10 THE COURT: Let me try to be more clear. In that  
11 instance, my recollection is that your argument was that it was  
12 inappropriate for a party to have the videotaped evidence of  
13 their interactions prior to the deposition, for fear that they  
14 would then conform their testimony to the physical evidence.

15 Here, you're taking the position that you are  
16 unwilling to proceed with the deposition unless you have  
17 custody of the physical evidence. In that prior conversation  
18 you took the position that that was inappropriate because it  
19 would allow the testifying witness to conform their testimony  
20 to the physical evidence rather than, in your view, telling the  
21 truth. Here, you're saying that it would be improper for you  
22 to allow your client to testify without having the opportunity  
23 to review the recorded information. How are those two  
24 arguments consistent?

25 MR. RHODEN: Well, your Honor, one, in this case, I

GCD8BACC

1 believe the federal rules require that these recorded  
2 statements be turned over, and they should have been turned  
3 over, and should have been turned over a long time. It is a  
4 requirement that it be turned over.

5 THE COURT: Let me be clear. Let me try to focus this  
6 also for the sake of time. The issue here is whether I compel  
7 Mr. Leath to appear, and the second issue is whether I should  
8 impose sanctions on you and your client for failing to appear  
9 at what I understand to be a properly noticed deposition.

10 The defendant did not make an application to me for a  
11 protective order with respect to the deposition. Therefore,  
12 that basis for me declining to impose sanctions is not  
13 available. Alternatively, I understand that the rule would  
14 require that I find that you were substantially justified in  
15 your decision not to appear. So what I am looking for now is  
16 your argument regarding why I should find that your decision  
17 not to appear was substantially justified.

18 What I have heard to this point is that it was  
19 substantially justified, in your view, because you were  
20 concerned that your client would be ambushed by the content of  
21 the recording, and that you wanted to negotiate a limitation on  
22 the scope of the deposition prior to his appearance in order to  
23 avoid that occurrence.

24 Are there any other bases that you proffer having  
25 provided substantial justification for your failure to appear?

GCD8BACC

1 MR. RHODEN: Also, because the recording was, in my  
2 view, illegally gotten. For the attorney to make this  
3 recording without his knowledge, then it was improper. The  
4 recording was done because the person was induced, improperly  
5 induced to give the statement. Mr. Leath was told that if he  
6 will have the conversation with him, he will be let out of the  
7 case. He was improperly induced. So this recording was  
8 illegally gotten, your Honor.

9 Your Honor, I would also like to say we are also  
10 requesting from this Court permission to make a motion to have  
11 this recording precluded, and that they be disqualified is  
12 another thing we are requesting.

13 THE COURT: I will take that issue up separately.

14 I would like to first deal with the plaintiff's  
15 motion, which is that I compel the testimony of Mr. Leath and  
16 that I impose sanctions as a consequence of the defendants'  
17 failure to appear at the deposition.

18 I understand that in your mind the two issues are  
19 interrelated, and they are interrelated. At the same time, I  
20 will evaluate each of them separately.

21 Are there any other statements that you would like to  
22 make with respect to the motion to compel or the grounds for me  
23 to conclude that your failure to appear with your client for  
24 the noticed deposition should not trigger imposition of  
25 sanctions?

GCD8BACC

1 MR. RHODEN: Your Honor, it was fair and reasonable.  
2 The reason why this did not go forward, for one, is because he  
3 held on to statements that he should have produced. He had  
4 these recordings since November 17. He held on to it until the  
5 eve of the deposition.

6 THE COURT: Thank you. Let me just try to be clear.

7 Whether Mr. Cohen failed to comply with his Rule 26(e)  
8 obligations by failing to supplement his discovery responses  
9 with this recording, whether Mr. Cohen acted unethically in  
10 recording the conversation, whether he inappropriately tricked  
11 Mr. Leath into talking with him in the first instance are all  
12 issues that we will discuss. The issue that I want to assess  
13 now is whether any of those things provides substantial  
14 justification for your failure to appear at the deposition. In  
15 other words, if Mr. Cohen did all of those things, why is it  
16 proper for you to take on the role of punishing those failures  
17 by failing to appear at the deposition?

18 MR. RHODEN: I just can foresee the deposition going  
19 forward with the full understanding that he would be asking  
20 questions -- which is why I believe he turned it over to me on  
21 the eve of deposition, because he knew he was going to be  
22 asking Mr. Leath questions regarding those recordings. And the  
23 recording was incomplete. There were other conversations that  
24 had taken place that I didn't have any recordings or any  
25 statements about.



GCD8BACC

1 THE COURT: Let me ask about that comment, Mr. Rhoden.  
2 You said that you had no information about those  
3 conversations. Are you in a position to ask your client about  
4 what happened in this conversation?

5 MR. RHODEN: Absolutely, your Honor.

6 THE COURT: So when you say, counsel, that you had no  
7 information about those conversations, you're not referring to  
8 a lack of any information about them; rather, you're saying  
9 that you did not have the recording. Is that correct?

10 MR. RHODEN: I did not have any recordings, whether it  
11 be tape recordings or written notes or anything from that.

12 THE COURT: Thank you.

13 Is there anything else that you would like to say with  
14 respect to this motion? The motion to compel is joined with  
15 this issue. The plaintiffs have proposed that I order that the  
16 deposition of Mr. Leath take place tomorrow or the following  
17 day, with the expectation that it will last approximately four  
18 hours. What is your position regarding the motion to compel  
19 the deposition of Mr. Leath?

20 MR. RHODEN: Your Honor, it's tied into the  
21 recordings. My position regarding his deposition is tied into  
22 the recordings.

23 THE COURT: Mr. Rhoden, are you telling me that your  
24 position is that no depositions at all should take place in  
25 this case as a consequence of the fact that Mr. Cohen allegedly

GCD8BACC

1 recorded this conversation, or misled Mr. Leath? Are you  
2 asking that I stop all discovery in this case until this issue  
3 is resolved?

4 MR. RHODEN: No, your Honor.

5 THE COURT: Thank you. Then let's talk about the  
6 issue of the motion to compel and the timing for it, that is,  
7 Mr. Leath's deposition. What is your position on that request?

8 MR. RHODEN: Your Honor, I am not saying all discovery  
9 should be stopped. I am asking this Court that Mr. Leath's  
10 deposition should not go forward until a decision is made  
11 regarding the recordings, yes, your Honor.

12 THE COURT: What decision, sir?

13 MR. RHODEN: Whether it should be precluded  
14 altogether, that the recordings should be precluded, the  
15 recordings should not be used. Because if that's not done,  
16 then he can use the recordings at the deposition. And should  
17 his firm be disqualified.

18 THE COURT: Thank you, sir.

19 That request is denied. I am going to grant the  
20 motion to compel Mr. Leath's deposition, and I am going to  
21 impose sanctions on defendant for failing to appear at the  
22 deposition.

23 Let me ask you, Mr. Rhoden, when would you propose  
24 that the deposition take place?

25 MR. RHODEN: On Friday, your Honor.

GCD8BACC

1 THE COURT: Thank you.

2 Counsel, is that acceptable?

3 MR. COHEN: I am a sabbath observer so I do leave  
4 early on Friday, so I have to be done by 2.

5 I have a conference in the Eastern District in the  
6 morning at 11, but I believe it's going to be canceled. I just  
7 have to write a letter to the court because we settled that  
8 case.

9 THE COURT: Good. Thank you very much.

10 So the motion to compel the deposition of Mr. Leath is  
11 granted. The deposition will take place this Friday in the  
12 offices of Mr. Cohen.

13 Beginning what hour, Mr. Cohen?

14 MR. COHEN: 10 a.m.

15 THE COURT: Beginning at 10 a.m.

16 I am ordering that the deposition take place at that  
17 date and time.

18 Mr. Rhoden, your arguments are misplaced. The rules  
19 regarding depositions are that depositions proceed. You cannot  
20 order a client not to answer a question unless there is an  
21 issue of privilege. While I understand that there are  
22 significant issues regarding Mr. Cohen's interactions with Mr.  
23 Leath, I am unable to conclude at this time that the  
24 appropriate sanction, if any, for that behavior is the further  
25 extension of discovery in this matter and the barring of

GCD8BACC

1 discovery as against Mr. Leath. I am not taking that issue off  
2 of the table as a potential consequence at trial, or otherwise  
3 in the future, but I am not going to allow the deposition to be  
4 deferred as a consequence.

5 Furthermore, the rules are very clear with respect to  
6 discovery. Rule 37 provides that a court must require that a  
7 party or its attorney or both "pay the reasonable expenses  
8 including attorneys' fees caused by the failure to attend that  
9 party's deposition, unless the failure was substantially  
10 justified or other circumstances make an award of expenses  
11 unjust."

12 The rule makes it clear as well that a failure  
13 described under Rule 37(d)(1)(A) is not excused on the ground  
14 that the discovery sought was objectionable, unless the party  
15 failing to act has a pending motion for a protective order  
16 under Rule 26(c).

17 Mr. Rhoden, you believed that the discovery here was  
18 objectionable. However, you did not file a motion for a  
19 protective order under Rule 26(c). As a consequence, I am  
20 required to analyze whether your failure was substantially  
21 justified or whether other circumstances make an award of  
22 expenses unjust.

23 In this instance, I have reviewed the exchange of  
24 e-mails, and in the exchange of e-mails, Mr. Rhoden, you wrote  
25 on December 7, "I am prepared to go forward with the deposition

GCD8BACC

1 today if you agree that you will not be asking Mr. Leath any  
2 questions at the deposition or at trial regarding any  
3 conversation you had that was not recorded. Otherwise I  
4 require that you provide the sum and substance of the portion  
5 of the conversation that you had with Mr. Leath that was not  
6 recorded." That was sent by you in an e-mail on December 7 at  
7 12:50 p.m.

8 I understand that your justification for failing to  
9 appear was that the party taking the deposition was unwilling  
10 to agree with you regarding your proposed limitations on the  
11 scope of the deposition. I cannot find that to be a  
12 substantial justification and, as a consequence, the rule  
13 requires that I order that you and your client pay the  
14 reasonable expenses caused by your failure to appear at the  
15 deposition as noticed.

16 As a practice note, Mr. Rhoden, in the future, in the  
17 event that you find discovery objectionable, the rules make  
18 plain what the process is. It is not that you become the judge  
19 and decide not to appear. Rather, they set forth the  
20 possibility of making a request for a protective order under  
21 Rule 26(c), a practice that you did not undertake here.

22 As a result, I am going to order that you pay the  
23 attorneys' fees for Mr. Cohen with respect to the morning spent  
24 waiting for you to appear at the deposition. I am also going  
25 to order that you pay the court reporter fees for the

GCD8BACC

1 deposition that did not go forward.

2 I am going to ask that Mr. Cohen -- I should say  
3 reasonable fees. I am going to ask that Mr. Cohen submit a  
4 letter, together with an affidavit, setting forth the amount of  
5 those costs and fees.

6 Mr. Rhoden, you will have the opportunity to object to  
7 the amount of those fees and costs, if you wish, before I issue  
8 an order imposing the obligation that you make that payment in  
9 the amount that I will establish in my order.

10 So that is the issue with respect to the deposition.

11 There are a number of other issues that you have  
12 raised which are substantial, namely, whether Mr. Cohen acted  
13 improperly with respect to the recording and with respect to  
14 whether Mr. Cohen misled Mr. Leath into the phone conversation  
15 at issue here.

16 Those are substantial issues, and I understand that  
17 you wish to raise the prospect of disqualifying Mr. Cohen and  
18 his firm from this case as a consequence of that asserted  
19 unethical behavior. And I would like to give you the  
20 opportunity to discuss those issues now.

21 MR. RHODEN: Thank you, your Honor.

22 Ms. Corchia from my office will discuss that issue,  
23 your Honor.

24 If I may just say briefly, your Honor, when we brought  
25 this motion to the Court, I believed that's what we were doing.

GCD8BACC

1 When bringing the issue regarding the deposition of Mr. Leath,  
2 this motion was that we were asking the Court for a protective  
3 order so that this tape -- maybe I mistakenly did not word the  
4 motion papers properly, but that's what I believed we were  
5 doing when we brought this motion to the Court. We were asking  
6 for a protective order regarding the deposition.

7 THE COURT: Thank you. I understand that you are  
8 framing this conference in that way. However, I have to  
9 observe that the letter submitted to the Court was dated  
10 December 9. The deposition was scheduled to take place on  
11 December 7. No prior application with respect to the  
12 deposition that did not go forward, with respect to which Mr.  
13 Cohen and the court reporter waited in vain for your  
14 appearance, took place before you made an application to the  
15 Court. As a consequence, the ruling that I made previously  
16 stands and I am compelling the deposition.

17 Counsel, please proceed.

18 MS. CORCHIA: Good afternoon, your Honor. My name is  
19 Vanessa Corchia from Armienti DeBellis.

20 As the Court will be aware from our portion of the  
21 correspondence of December 9, we are making an application for  
22 this Court to permit us to formally move to disqualify  
23 plaintiff's counsel, and, also, for preclusion of not only the  
24 actual recording of the telephone conversation between Mr.  
25 Cohen and Mr. Leath that took place on November 17, but also to

GCD8BACC

1 preclude any use or any information gleaned from Mr. Leath for  
2 which there is no tape recording so that we don't have those  
3 portions of the tape.

4 I agree with your Honor that this is a significant  
5 issue, and that's why it is something that would need to be  
6 fully briefed and fully supported. Some of the statements I  
7 have heard for the first time today with regard to how the  
8 statement came about, your Honor. But I can only tell you that  
9 we were advised by Mr. Leath for the first time on the morning  
10 the deposition was to take place, as to when we played the  
11 audio recording for him, he did give us input about it, and he  
12 was completely taken aback that he had been recorded. When we  
13 got the tape it was late in the game. It was our first  
14 opportunity to play it for Mr. Leath and that's why things sort  
15 of happened very quickly that morning.

16 But, your Honor, there are a number of rules in the  
17 Code of Professional Responsibility that we feel that it could  
18 fall under.

19 THE COURT: Thank you. Just for the sake of  
20 efficiency, I will grant you leave to file a separate motion  
21 with respect to potential disqualification of Mr. Cohen on the  
22 bases that you have articulated in your letter. I am going to  
23 set a briefing schedule for that momentarily.

24 Let me just ask you, just to focus your remarks,  
25 understanding that generally I, as a federal court, do not



GCD8BACC

1 enforce state bar disciplinary rules, nonetheless, that I have  
2 the inherent authority to address attorney misconduct during  
3 the course of a litigation before me, the question that I have  
4 is whether disqualification is the appropriate sanction here.

5 So your letter describes the ethical rules, or one of  
6 the principal ethical rules that you believe that Mr. Cohen may  
7 have breached, but you don't clearly address the standard  
8 required for disqualification of counsel. How does this  
9 conduct meet that high standard, given the assertions of  
10 several courts that a party seeking disqualification must meet  
11 "a heavy burden of proof in order to prevail with respect to  
12 such a motion," and that disqualification is warranted only if  
13 an attorney's conduct tends to taint the underlying trial?

14 Let's assume the ethical violations of the rules that  
15 you have described, just for argument sake. How did those  
16 ethical violations lead you to conclude that disqualification  
17 is the appropriate sanction here? And this is not oral  
18 argument. I am just curious.

19 MS. CORCHIA: Your Honor, that's why our request is,  
20 combined with our request for preclusion of the contents of the  
21 tape, any evidence regarding the tape, any evidence of the  
22 nonrecorded portions of the conversation. Because the problem  
23 is now Mr. Cohen is uniquely privy to a discussion with Mr.  
24 Leath, at a time when it certainly should have been expected  
25 that representation would be imminent, because Riverbay had

GCD8BACC

1 retained us as counsel for the other police officers. And so  
2 it really -- I think you even began -- the whole thing does  
3 smack of trickery, it smacks of the appearance of impropriety.

4 THE COURT: Thank you. A question that you will have  
5 the opportunity to address in your briefing is whether the  
6 remedy that you are seeking is the appropriate remedy.

7 Just for conversation purposes, you may look at some  
8 of the commentary on the criminal exclusionary rule. Here,  
9 there are alternative means to sanction Mr. Cohen for  
10 violations of any ethical rules, if there are any. So a  
11 question that I would appreciate seeing addressed in your  
12 papers is why it is that you believe that a cognate of an  
13 exclusionary-type rule is the appropriate sanction for the  
14 asserted ethical violations by Mr. Cohen.

15 So is there anything else you would like to tell me  
16 about that proposed motion and request to preclude evidence?

17 MS. CORCHIA: Not at this time, your Honor.

18 THE COURT: Thank you.

19 Let me be clear with respect to the deposition of Mr.  
20 Leath that's going forward. I am not permitting any  
21 constraints on the subject matter of that deposition. The  
22 usual rules apply. The witness generally should not be  
23 instructed not to answer questions unless there is a basis for  
24 an assertion of privilege.

25 Mr. Cohen, is there anything you would like to say

GCD8BACC

1 regarding the proposed motion for disqualification and other  
2 consequences of the asserted ethical breaches alleged by  
3 defendant?

4 MR. COHEN: I just want to quickly address, there were  
5 statements made about the e-mail exchange I had with Mr. Leath,  
6 where there is this parenthetical. I was specifically  
7 addressing his repeated statements -- I didn't even hear his  
8 story. How could I even say that I would let him out of the  
9 case -- where he says, once you hear what happened, you will  
10 let me out of this case. I never once, and I want to make that  
11 very clear on the record, I took particular care to make sure I  
12 explained his risks in speaking to me. In this e-mail, I did  
13 it in writing, I said very clearly that you told me you were  
14 going to be going pro se, that you're going to be representing  
15 yourself. I made that very clear and explained him the risk,  
16 and I believe that I acted within the confines of what is  
17 permissible in the state of New York.

18 That's really all I have to say about that. I guess I  
19 will address that more further in the motion that your Honor is  
20 going to set a briefing schedule for.

21 THE COURT: Thank you very much.

22 Counsel for defendants, when would you propose to make  
23 this motion? I should say that I am not in a position now to  
24 draw any conclusions regarding the disputed facts underlying  
25 this motion. The parties should give some thought as to the

GCD8BACC

1 appropriate procedure for any factual issues to be resolved by  
2 the Court in connection with the motion. With that comment,  
3 counsel, when will you anticipate submitting the motion?

4 MS. CORCHIA: May we have 30 days?

5 THE COURT: Mr. Cohen, is that acceptable to you?

6 MR. COHEN: Sure.

7 THE COURT: How much time would you propose that I  
8 allot for your response?

9 MR. COHEN: I think a 30-day response would be fine.

10 THE COURT: Counsel?

11 MS. CORCHIA: Yes. I will agree to that.

12 THE COURT: The briefing schedule follows: The motion  
13 for disqualification and preclusion, presumably of evidence to  
14 be used at trial, will be due 30 days from today. Any  
15 opposition will be due 30 days thereafter. Any reply will be  
16 due two weeks following service of the opposition.

17 Let me foreshadow for you that there is a good  
18 probability that I will refer this motion to Magistrate Judge  
19 Peck. My hope is that the substance of this case will proceed  
20 forward while this issue is litigated in parallel.

21 So I believe that we have addressed the issues that  
22 were raised in your joint letters. I understand that otherwise  
23 the parties are on track to complete discovery with the limited  
24 scope that I articulated in my October 20 letter, and as a  
25 result, the discovery should be concluded in this case on the

GCD8BACC

1 19th, as I ordered.

2 MR. COHEN: Your Honor, there are couple of exceptions  
3 to that that are outside our control. One is the motion to  
4 unseal the grand jury minutes is still pending in Bronx supreme  
5 court, or Bronx criminal court, for that matter. We FOIL'd the  
6 district attorney's file, which was in storage, and I don't  
7 believe we have gotten the full file yet; we have gotten bits  
8 and pieces, but not the whole thing.

9 Finally, I only received the fully executed originals  
10 of the HIPAA authorizations for the three officers that got  
11 injured, I only received them a couple of weeks ago, the actual  
12 originals, and I immediately sent them to be processed, and I  
13 still have not received the medical records.

14 These are three items that are still outstanding that  
15 I probably will not have by the 19th, but not because I haven't  
16 tried.

17 THE COURT: Thank you. If that information rolls in  
18 after the 19th, you will be able to retain it, but as set in my  
19 order, December 19 is the deadline for the completion of fact  
20 discovery.

21 Fine. Expert discovery ends on January 23rd. Summary  
22 judgment motions are due on February 20, if any such motions  
23 are to be made.

24 Let me remind you, counsel, of the obligation to  
25 submit a premotion conference request letter within a week

GCD8BACC

1 following the close of discovery, and in accordance with the  
2 case management plan and my authority under Rule 16, if you  
3 fail to submit such a premotion conference request letter on  
4 that schedule, you will have waived your opportunity to bring a  
5 Rule 56 motion in this case.

6 Mr. Cohen, anything further?

7 MR. COHEN: Nothing further.

8 THE COURT: Mr. Rhoden, anything further?

9 MR. RHODEN: No.

10 THE COURT: I am going to step down while we call the  
11 next case.

12 Thank you very much.

13 (Adjourned)

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25